No. 2475

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CHOY GUM, sometimes referred to as Lo KING,

*Appellant,*

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,

*Appellee.*

## BRIEF FOR APPELLEE.

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*Filed this*.....*day of January, 1915.*

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*FRANK D. MONCKTON, Clerk.*

*By*.....*Deputy Clerk.*

F. D. Monckton.

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The Supreme Court has again and again laid down the rule that the courts will not, on a petition for a writ of habeas corpus, review the decision of the Secretary of Labor, unless

(1) There has been unfairness in the procedure hearings; or

(2) There is not at least some evidence upon which the Secretary of Labor might base his finding.

Approaching this case with a view to discussing both phases of the court's power, it will be necessary to chronologically set forth a brief statement of the facts.

## Facts.

Since the statement of facts by counsel for the appellant is somewhat incomplete, the appellee wishes to make clear some of the circumstances which are all of record in this case.

The Secretary of Labor at Washington, D. C., decided the question of fact that this woman, Choy Gum, came to the United States on October 28th, 1908, under the name of Lo King, and was admitted into the country as the wife of a citizen.

At the hearings of the alien, just after her arrest by the immigration authorities, she testified that she had come into the United States at the age of two years, and had remained here ever since (Trans. 14); that she had been engaged, but owing to the death of her fiance, the marriage had never taken place. Two experienced immigration officers, H. Edsell, Assistant Commissioner of Immigration, and F. H. Ainsworth, inspector, testified on October 10th, 1912, at a hearing given the alien Choy Gum, alias Lo King, at Angel Island, at which hearing her counsel, George A. McGowen was present, that they were firmly convinced that the said Choy Gum was the same person who entered the United States in 1908 as the wife of an alleged citizen of the United States (Trans. 36). At that hearing, Assistant Commissioner H. Edsell made the following statement:

> "The woman now before me was brought to this station some days ago by her attorney wholly for the purpose of identification or of

comparision with the photograph in the records of Lo King, admitted at this port on October 23, 1908, ex. SS. 'China'. I compared her with said photograph and had no hesitancy in reaching the conclusion that she was the original of the 1032/231 (Lo King, alias Choy Gum) 10/10/12. photograph referred to. I held the photograph up so she could see it and pointed to it, and she nodded her head affirmatively, apparently intending to indicate to me that it was her photograph."

The inspector-in-charge, F. H. Ainsworth, in continuing the hearing (Trans. 37) on October 10th, 1912, in giving his conclusions on this point said:

"In my judgment, this woman is the one who was admitted as Lo King, wife of a native, Hom King Fook, from the SS. 'China', October 23, 1908, and whose photograph is attached to the record. At this point, Attorney Geo. A. McGowan, who represents the alien, appears and will make any statement he wishes to make in behalf of the alien, or ask her any questions he thinks pertinent."

When the immigration record in the case of said alien, Choy Gum, was finally completed, including all the evidence submitted on behalf of the said alien by her counsel, and was forwarded to the Secretary of Labor at Washington, D. C., for his decision, the Acting Secretary of Labor, Benjamin S. Cable, issued a warrant of deportation for said Choy Gum on the 15th day of November, 1912 (Trans. 52), in which, among other provisions, the following charge and finding appeared:

"WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector F. H.

> Ainsworth, held at Angel Island, California, I have become satisfied that the alien, Choy Gum, alias Lo King, who landed at the port of San Francisco, Cal., ex SS. 'China' on the 23d day of October, 1908, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 25, 1910, to wit:
>
> " 'That the said alien is a prostitute and has been found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith.' "

The immigration record of the case of the alien Choy Gum further shows that an application for warrants of arrest for Choy Gum and another alien, Leong Toe, was made by the Commissioner of Immigration at Angel Island, Cal., on September 20th, 1912. On the night of September 19th, 1912, the police force of San Francisco, under instructions from Chief of Police White, acting on their own initiative, and not upon the instigation or request of the Immigration Bureau, raided a Chinese house of prostitution at No. 5 St. Louis Alley in San Francisco, and took into custody three Chinese women, Choy Gum, Leong Toe and Ton Yook Lan, and a Chinese youth who gave the name of Wong Go. Wong Go testified that he was 24 years of age; that he was a resident of Stockton, California; that he came to the United States about the year 1902 and was at that time duly landed as the son of a domiciled Chinese merchant to work in his father's store in Stockton, California; that since his admission into the United States he had been employed at

periods in this store and had looked after the partnership interests of his father, who had since returned to China. This statement and testimony of Wong Go having been corroborated by the immigration records he was accordingly released from custody.

The Chinese woman Ton Yook Lan, who was taken into custody with the two other women, testified that she was a native of the United States, having been born in San Francisco (Trans. 19). Upon an investigation and consideration of her claims, she was also released.

The two alien women, Choy Gum and Leong Toe, were then placed under arrest under and by virtue of the warrants of arrest emanating from the Secretary of Labor. Each was charged with being an alien prostitute found practicing prostitution subsequent to her entry into the United States, and each was ordered to be held in custody to show cause why she should not be deported in conformity with the law. The case of Leong Toe was finally submitted to the Secretary of Labor and she was duly ordered deported by a warrant of deportation. Upon a petition for a writ of habeas corpus to the District Court, No. 15,349, Judge Van Fleet sustained the demurrer of the government, and the petitioner appealed to the Supreme Court of the United States. The case was eventually dismissed on the motion of counsel for appellant, and Leong Toe was finally deported to China.

The alien, Choy Gum, was arraigned under a warrant of arrest dated September 26th, 1912. Upon this she was given a hearing, and accorded every opportunity under the immigration rules and regulations to present any and all evidence in her behalf. On the 15th of October, 1912, the Secretary of Labor issued the warrant of deportation.

Counsel for the alien then petitioned the United States District Court (Court No. 15,345) for a writ of habeas corpus, and the woman was admitted to bail pending the termination of these proceedings. On the 19th of December, 1912, Judge Van Fleet sustained the demurrer and the petition upon which the petitioner gave notice of appeal to the Supreme Court of the United States.

On June 2nd, 1914, the office of the United States Attorney for the Northern District of California received a communication from the Department of Justice at Washington, D. C., enclosing a copy of the mandate from the Supreme Court of the United States, dismissing the appeal upon the motion of the appellant's counsel. The mandate now on file in the District Court for the Northern District of California shows that the order of dismissal was made on March 16th, 1914, but that it was not executed and approved until May 21st, 1914. Petitioner's counsel was not content to abide by his dismissal of the case in the Supreme Court, but immediately surrendered the alien Choy Gum to the custody of the immigration officials at Angel Island, California, and filed a new petition for a writ of

habeas corpus on April 16th, 1914 (Court Record No. 15641), and again secured the release of Choy Gum on bond. Here was a situation of a new petition filed after the order of dismissal, but before the mandate of the Supreme Court of the United States had been executed and filed, and fully a month and a half before the certified copy of the mandate of the United States Supreme Court dismissing the appeal was received and spread upon the minutes of the District Court for the Northern District of California.

The new petition for a writ of habeas corpus which is now before this court was based upon the same record and set forth the same facts and contentions as the former petition which had been before the Supreme Court. The matter again came on for hearing upon a demurrer to the petition, and Judge Dooling sustained the demurrer and denied the writ. On the 10th day of August, 1914, the matter was appealed to this court.

The above facts are all matters of record of the District Court for the Northern District of California, and of the Supreme Court of the United States, and show that this alien woman has been out on bail during all the court proceedings, and that there has been no means of deporting her, nor of restraining her from continuing her practice of prostitution if she was so inclined.

The official docket and the files of the United States District Court for the Northern District of

California show, among others, the following entries:

In the matter of

Choy Gum, on habeas corpus. No. 15,345.

Nov. 29, 1912. Petition filed.

Dec. 19, 1912. Demurrer sustained.

June 24, 1913. Citation on appeal to U. S. Supreme Court.

Mar. 16, 1914. Order dismissing appeal in U. S. Supreme Court.

May 21, 1914. Order executed.

June 2, 1914. Mandate from Supreme Court filed in District Court.

In the matter of

Choy Gum, on habeas corpus. No. 15,641.

April 16, 1914. Petition filed.

April 27, 1914. Order admitting to bail.

July 1, 1914. Demurrer sustained.

Aug. 10, 1914. Citation to Circuit Court of Appeals.

Counsel for petitioner in his brief to this court has set forth four assignments of error by the District Court and has discussed each assignment separately. In following the assignments in the order arranged by the appellant, the government will deal with each alleged error with reference to the two propositions:

(a) Were the hearings or immigration proceedings in any way unfair? and

(b) Was there an abuse of discretion on the part of the Secretary of Labor in issuing a warrant of deportation upon the evidence before him?

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FIRST:

The first assignment of error is quoted on page 27 of appellant's brief, and the purport of that paragraph is that certain witnesses, Leong Toe, Ton Yook Lan and Wong Go, were prejudiced and biased in favor of the government, and for that reason the alien Choy Gum was denied a fair hearing. It is assigned that the lower court, in holding that the admission of this testimony into the record was in no way unfair, was error. Counsel says that the alien has been "very much aggrieved, injured and oppressed" because the immigration officials refused to believe her statements that she entered the United States over twenty years ago, and because they identified her as Lo King, who entered the United States on the SS. "China" on the 23rd day of October, 1908, as the wife of a citizen.

The Secretary of Labor, upon the evidence presented, made the finding that Choy Gum and Lo King were identical. His finding of fact is final. He based his conclusion upon the evidence which consisted of the opinions (after comparison of the alien with a photograph of Lo King) of two of his

experienced officers, Mr. H. Edsell, Assistant Commissioner, and Mr. F. H. Ainsworth, Inspector, and the entire immigration record, together with the photographs of the alien and the person known as Lo King, all of which were before him when he rendered his decision.

Counsel further claims that it was an abuse of discretion for the Secretary of Labor to rule that Lo King and Choy Gum were one and the same person, because no Chinese witnesses were produced to substantiate this fact. However, it should be remembered that only Chinese persons would know that Choy Gum and Lo King were one and the same person, and it is the experience of the immigration officials that it is virtually impossible to get Chinese to testify against each other in immigration proceedings. This is true not only because they feel aggrieved at the immigration laws which they believe single out their race for exclusion from this country, but they are not disposed to testify in each other's behalf, because they run great risks of personal injuries, or even of losing their lives—especially in the case of a slave woman—should they testify against her or her owners.

With the statement of counsel for alien that the witnesses Wong Go and Ton Yook Lan made self-serving declarations in testifying, we cannot agree. Counsel further states that these witnesses testified against Choy Gum in order to extricate themselves, and intimates that their declarations were false because of their self-interest. A perusal of the

testimony shows that these witnesses were not held for any offense, nor for deportation, and that no charges were ever made against them. It will further be seen that they endeavored to shield the alien Choy Gum, and that their statements regarding her acts of prostitution were most reluctantly given. There is nothing in the immigration record which shows that there were any promises of immunity made or that these witnesses were coerced in any way. In spite of the circumstances of Ton Yook Lan's case, even though she admitted her life of prostitution, the government was of the opinion, after an investigation of her claims of citizenship, that she had been born in the United States.

The prosecution of Choy Gum's deportation had nothing whatsoever to do with the case of Wong Go. Furthermore, at that time the government had not even attempted to test the policy of deporting a merchant's son found laboring in the United States, and Wong Go was not shown to have done anything which would forfeit his exempt status as a merchant's son.

Appellant further states that as a point of unfairness, counsel for the alien did not have an opportunity to cross-examine the witnesses called at the hearing of the alien. Neither the law, nor the Immigration Rules and Regulations provide that an alien or counsel shall have the right of cross-examination, especially where affidavits have been filed on behalf of the government. Rule 22 of the Immigration Rules and Regulations, which is sub-

stantially quoted on page 24 of appellant's brief, does not accord to the alien or his counsel the right of cross-examination. Under that rule counsel may, during the course of the proceedings, be allowed to inspect the warrant of arrest and all the evidence upon which it is based, and at such stage of the proceedings as the inspector in charge before whom the proceedings are held "shall deem proper", he shall advise the alien that he may thereafter be represented by counsel. This rule has been affirmed as being the law, and has been most emphatically interpreted in the case of

Low Wah Suey v. Backus, 225 U. S. 460.

Counsel, on page 31 of his brief, quotes a portion from that opinion, but it is regretted that he has failed to draw attention to that part of Judge Holmes' decision which defines rule 22-4B on the point of interference by counsel in an immigration hearing. It is, therefore, set forth as follows:

> "It is further alleged that Li A. Sim was refused the right to be represented by counsel during all stages of the preliminary proceedings, and was examined without the presence of her counsel and against her will by the immigration officer at the port of San Francisco, and before she had been advised of her right to counsel, and before she was given an opportunity of securing bail; and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which *she was requested by the immigration inspector against her will and without the presence of counsel, who was refused permission to be present,* and

that at certain stages of the proceedings she was refused the right to consult with counsel. This objection, in substance, is that under examination before the inspection officer, at first she had no counsel. *Such an examination is within the authority of the statute, and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel.*"

* * * * * *

"It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of rule 35. From these rules, it appears that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, *at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be represented by counsel,* who shall be permitted to be present at the further conduct of the hearing, to inspect and make a copy of the record of the hearing so far as it has proceeded, and to meet any evidence that theretofore has been or may thereafter be presented by the government."

A reading of this whole Low Wah Suey case will show how fairly, clearly and liberally, the Supreme Court construes the powers given by Congress to the immigration officials, and that the courts are adverse to interfering with the hearings of the Immigration Bureau where such proceedings are conducted in accordance with the rules.

Judge Dietrich, sitting in the District Court for the Northern District of California, recently decided the case of

Ex parte Garcia, 205 Fed. 53.

In his opinion he enters into a most thorough discussion of the privileges given under rule 22, subd. 4B, of the Immigration Rules and Regulations, and holds that the right of cross-examination is not accorded to the alien or his counsel.

> "Was the failure of the inspector to give notice to petitioner's counsel of his intention to take the last group of affidavits a breach of this provision? Counsel has the right 'to be present during the further conduct of the hearing', and the petitioner contends that this privilege includes the right to be present at the taking of affidavits; but, as already pointed out, the mere presence of counsel while the government is taking affidavits would avail nothing. The only substantial right would be that of cross-examination. The term 'hearing' may or may not have been intended to cover the taking of affidavits, and in the light of the practical construction that has been placed upon the rule it should be held, I think, that it was not intended to go to that extent. *It is significant that, while certain privileges of counsel are enumerated, cross-examination is not one of them. Evidence may be offered to rebut evidence produced by the government, but there is no suggestion of the right to cross-examine. Apparently it was contemplated that evidence would be produced by both sides in the form of affidavits, and, therefore, no provision was made for cross-examination.*"

That Judge Dodge of the District Court of Massachusetts has made a careful study of this phase

of the immigration laws, is indeed evident from his masterful opinion in the case of

In re Jem Yuen, 188 Fed. 350,

in which he clearly presents the requisites of a fair hearing before the Immigration Bureau. He does not even intimate that alien's counsel shall be accorded the privileges of cross-examination, as is the natural right of any person in a criminal trial.

> "It is well settled that officers of the government, to whom the determination of questions of this kind is entrusted under statutes like those governing these proceedings, are not bound by the rules of criminal procedure, nor by rules of evidence applied in courts. It is not enough for a review of their decision on habeas corpus that there was no sworn testimony, or no record of the testimony or of the decision. No formal complaint or pleadings are required. *The alien's opportunity to be heard need not be upon any regular set occasion, nor according to the forms of judicial procedure; it may be such as will secure the prompt, vigorous action contemplated by Congress and appropriate to the nature of the case.* See Nishimura Ekiu v. United States, 142 U. S. 651, 663, 12 Sup. Ct. 336, 35 L. Ed. 1146; Fong Yue Ting v. United States, 149 U. S. 698, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905; The Japanese Immigrant Case, 189 U. S. 86, 101, 23 Sup. Ct. 611, 47 L. Ed. 721."

In support of the contention that the alien should be accorded the right of cross-examination, counsel for appellant has cited, with much comment, the case of Hanges v. Whitfield, 209 Fed. 675, and lays great stress on the statements therein set forth.

That Judge Reed's opinion cannot harmonize with Judge Dietrich's and Judge Dodge's rulings, is very evident. Moreover, the case of Hanges v. Whitfield is now on appeal, and it is a mooted question whether this ruling will stand when it reaches the appellate court. It is not the purpose of this brief to endeavor, or even attempt, if such a thing were possible, to overrule Judge Reed in his opinion in the Hanges case, but exception must certainly be taken to his apparent confusion of an immigration hearing with a judicial trial or a criminal prosecution. It should be noted that he can find no immigration decision to support the following statement in his opinion in that case:

> "The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact; and it is indispensable in all *judicial* proceedings in this country, *civil* or *criminal,* that ex parte testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceedings to the party against whom it is proposed to be used to cross-examine the witnesses giving such testimony, cannot rightly be used against him. 1 Greenl. Ev. (16th Ed.), sec. 447; 2 Wigmore on Ev., secs. 1361, 1365; Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 93, 33 Sup. Ct. 185, 57 L. Ed. 431."

The higher courts have so many times decided that an immigration hearing is a summary proceeding, that it has become an elementary principle.

Furthermore, a departmental investigation before an Immigration Bureau is not a *"judicial"* proceeding, nor is it a *"civil"* nor a *"criminal"* trial. It is not a punishment for any crime. It is merely an *inquiry into the status of an alien* in which the Immigration Bureau acts entirely within its jurisdiction and prerogative in granting a summary hearing.

A recent Supreme Court decision was most pointed on this phase of immigration proceedings. The case involving a criminal prosecution and a deportation proceeding which has been so many times quoted by petitioners since its decision in the District Court, has recently been reversed by the Circuit Court of Appeals and the Supreme Court, and in sustaining the Immigration Bureau, the Supreme Court of the United States has thrown the proverbial monkey wrench into the gearings of the machinery of petitioners for writs of habeas corpus, in that it has settled many points most decisively. This is the case of

Frick v. Lewis, 233 U. S. 291.

This case holds that the result of a criminal prosecution has no bearing on the decision of the Secretary of Labor.

> "We agree with the Circuit Court of Appeals that the verdict and judgment acquitting petitioner under the indictment does not render the present controversy res judicata. The issue presented by the traverse of the indictment was not identical with the matter determined by the Secretary of Commerce and Labor. And,

> besides, *the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused. The distinction between a criminal prosecution and an administrative inquiry by an Executive Department or subordinate officers thereof has been often pointed out.* Zakonaite v. Wolf, 226 U. S. 272, 275, and cases cited; Williams v. United States, 186 Fed. Rep. 479."

The case of

Zakonaite v. Wolf, 226 U. S. 272,

and authorities there cited, should be convincing to Judge Reed that his decision in Hanges v. Whitfield, supra, that the rules of evidence in a criminal prosecution have no application to a deportation proceeding.

> "With respect to the second point little more need be said. It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations *is not a criminal prosecution within the meaning of the 5th and 6th Amendments;* that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question. Fong Yue Ting v. U. S., 149 U. S. 398, 730, 31 L. Ed. 905, 919, 13 Sup.

> Ct. Rep. 1016; United States v. Zucker, 161 U. S. 481, 40 L. Ed. 779, 16 Sup. Ct. Rep. 641; Wong Wing v. United States, 163 U. S. 228, 237, 41 L. Ed. 140, 143, 16 Sup. Ct. Rep. 977; United States ex rel Turner v. Williams, 194 U. S. 279, 289, 48 L. Ed. 979, 983, 24 Sup. Ct. Rep. 719; Chin Yow v. United States, 208 U. S. 8, 11, 52 L. Ed. 369, 28 Sup. Ct. Rep. 201; Tang Tun v. Edsell, 223 U. S. 673, 56 L. Ed. 606, 607, 32 Sup. Ct. Rep. 359; Low Wah Suey v. Backus, 225 U. S. 460, 468, 56 L. Ed. 1165, 1167, 32 Sup. Ct. Rep. 734."

In the case of

Bugajewitz v. Adams, 228 U. S. 584, 590,

it was also ruled that deportation is not a judicial proceeding, nor is it in the nature of a criminal prosecution.

> "The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination *by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want.*"

The privilege of having counsel at the immigration hearing is not a matter of right, but it is a privilege conferred by the immigration rules. The purpose of allowing counsel to be present at these hearings, it is believed, could not be better expressed than is stated in an opinion of the Commissioner General of Immigration at Washington,

D. C., to the Commissioner of Immigration at San Francisco, California:

> "Ordinarily the government's case can be practically completed before counsel is allowed to intervene for any purpose; and when intervention is allowed, it is not for the purpose of cross-questioning and grilling the government's agents, but to enable counsel to acquaint himself with the nature of the evidence already of record, and to offer any further evidence that he may be able to produce bearing upon the questions actually in issue."

It is indeed difficult to reconcile these opinions, and the excerpts from the Supreme Court decisions, with the statements of Judge Reed in the case of Hanges v. Whitfield, supra, where he endeavors to say that a deportation proceeding is in the nature of a criminal trial.

On pages 39 and 40 of appellant's brief, counsel has alleged that the witnesses Wong Go and Ton Yook Lan testified in the hope or promise of being restored to their liberty. Obviously this allegation is thrown in as a mere guess, and finds no support in the copy of the record in the transcript. This was not a hearing as to the question of whether or not either of these witnesses was subject to deportation. Whether Wong Go was a merchant's son found laboring, or whether Ton Yook Lan had not established her nativity, are beside the mark. At that time Wong Go was employed in his father's store in mercantile pursuits, and Ton Yook Lan's claim of citizenship could not be refuted, and the

Immigration Service does not maintain a big dragnet to bring in every alien or citizen and deport them without even a suspicion of a reason therefor.

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SECOND.

The second assignment of error is set forth on page 41 of appellant's brief and in substance alleges that the testimony of Arthur T. Layne and Dennis Bohle was taken at a hearing at which counsel for the alien was not present, and further that no opportunity was afforded to answer this testimony, and for that reason this is a point of unfairness.

The statement of appellant that the making of affidavits was the conducting of a hearing, is a mistake. The testimony of Layne and Bohle, if it may be called testimony, was simply in the form of affidavits (Trans. 50, 51), and was not in the nature of a hearing. They appeared before Wm. M. Gassaway, an immigrant inspector stationed at the Ferry Building in San Francisco, and swore to affidavits in which they stated that they assisted in the arrest of Choy Gum, and that the premises from which this alien woman was taken, were known to them to be a house of prostitution. There is a well-recognized difference in immigration proceedings between the making of affidavits and the taking of statements by question and answer. The making of an affidavit which is afterwards put into

the record of an immigration case, does not constitute a hearing under the interpretation of the Immigration Rules and Regulations. That these affidavits were sworn to on the 15th day of October, 1912, before an immigration official and were later incorporated into the immigration record in this alien's case, without counsel being present, was in no possible way unfair. A leading case directly in point on the using of ex parte affidavits in immigration proceedings, and a case which the government wishes to particularly call to the attention of this court, is

Ex parte Pouliot, 196 Fed. 437, 442,

which is quoted at page 43 of appellant's brief with an attempt by counsel to draw an imaginary distinction between that case and appellant's case. The only feature of counsel's distinction between these two cases is that it is an explanation which fails to explain.

In the case of Ex parte Garcia, supra, it is held that the taking of ex parte affidavits without the presence of alien's counsel, is not judicial error.

> "A more serious criticism is that affidavits or ex parte depositions were taken without notice after the petitioner had employed counsel; but even here it is again to be said that if it be conceded that the entire hearing may be had upon affidavits the incident is without prejudicial error, for in the taking of affidavits by the government the presence of petitioner and his counsel could subserve no useful purpose. Affidavits are of necessity ex parte; there is no place for cross-examination."

The case of Ex parte Ung King Ieng, 213 Fed. 119, from which counsel for appellant attempts to get some comfort, is set forth on page 47 of his brief. Judge Dooling decided that case just prior to rendering his decision in appellant's case now before this court, and in making his later ruling had no reason, because of the great dissimilarity of the facts, to even refer to his decision in the case of Ex parte Ung King Ieng. In this last mentioned case there was an actual hearing at San Jose, California, at which witnesses were called by the Immigration Bureau, and were examined in the presence of the alien's attorney by question and answer, and the testimony was taken down by reporter. Alien's counsel in San Francisco had been notified to be present. When he appeared at San Jose and requested permission to ask a few questions of the government witnesses the inspector in charge refused to allow him to do so. That this was unfair and that Judge Dooling was correct in his decision, cannot be disputed, but had counsel quoted a portion of the paragraph just preceding that excerpt set out in his brief, he would have emphasized these words:

> "There is no question here of the power of the immigration officers to compel the attendance of witnesses, for the witnesses were actually in attendance. There is no question here of presenting the case on ex parte affidavits, because that was not done."

The evidence received from Layne and Bohle was not at a hearing, but was through affidavits, and

certainly Judge Dooling is correct when he states in the case of Choy Gum that no right of cross-examination should have been allowed.

> "The petition avers that on November 7th, the last day of the hearing, two affidavits of police officers were presented against petitioner, which affidavits were taken on October 15th, and that petitioner by her counsel requested an opportunity to cross-examine the said officers, as also an opportunity to meet the evidence contained in such affidavits, which requests were denied and the hearing immediately closed. *As to the first request, it has been held that evidence may be presented in the form of affidavits, and in such case I am of the opinion that the right to cross-examine does not exist.*"
>
> (Trans. p. 56.)

The further allegation in the second assignment of error that the case was closed and the record sent on to the Secretary of Labor at Washington, D. C., before the petitioner had an opportunity to answer the charges in the record, is an argument in the nature of which counsel for appellant once characterized as a "false alarm". A perusal of the record shows that counsel was given ample time to meet any evidence produced by the government, and that the dialogue between counsel and Immigration Inspector Ainsworth (Trans. 41, 43), shows plainly that counsel acquiesced in the closing of the record and in the transmittal of it to the Secretary of Labor, and stated that his assistant counsel in Washington, D. C., would represent the alien before the Secretary of Labor. Judge Dooling was clearly

of this view when he said in his decision (Trans. 56):

> "The second request, that is for an opportunity to meet the evidence presented unexpectedly to petitioner on the last day of the hearing, although averred in the petition, does not appear from the record attached to have been made. The only request shown by the record was a request for an opportunity to cross-examine, no request for a continuance, or indeed for anything else having been made. As to these specifications of unfairness I am of the opinion that they are without legal merit."

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THIRD.

The statement in the petition (Trans. 8) that evidence of some kind, detrimental to petitioner, was put in the record and forwarded to the Secretary of Labor, without offering the alien or her counsel an opportunity of seeing or answering the same, is a statement made upon information and belief, and without any foundation. In Judge Dooling's opinion in this case he says (Trans. 57):

> "But in proceedings like this, an averment of this nature is easily made, and I am not disposed to give it any attention, unless the reason for the belief, and the nature and source of the information is set out, so that the court may say whether there is any reasonable ground for the belief, or any basis for the information."

This seems to cover the point exactly that this allegation in the petition was demurrable because of the insufficiency of the statement of facts.

That the inspector in charge of a case is in duty bound to send with the immigration record to the Secretary of Labor, a letter of transmission giving his views and a statement of the case, is a provision of rule 22, subd. 4 (c), of the Immigration Rules and Regulations. It is also provided that such a letter of transmission is a privileged communication between the Bureau of Immigration and the Secretary of Labor, and the failure to show such letter to the alien or his counsel, is not in any way prejudicial error. This was clearly decided in Ex parte Garcia, supra, as follows:

> "The further contention, made by the petitioner, that his counsel was not given an opportunity to see the *recommendations* forwarded by the officer in charge to the Secretary of Commerce and Labor, is, I think, without merit. These recommendations do not constitute a decision, from which an appeal must or can be taken. The only adjudicating officer is the Secretary himself, and with the entire record of the facts open to his inspection and examination counsel for the petitioner may fully argue all questions in the brief which he is permitted to file and have forwarded to the Secretary. This argument may be made on the theory that the recommendations of the officer in charge will be adverse to the petitioner, and presumably it is made with such possibility in mind."

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FOURTH.

The fourth subdivision of appellant's brief according to his own statement, is simply an "ampli-

fication of the different matters" under other assignments of error. The attack upon the rules and regulations governing the immigration hearings on the ground that they are unconstitutional and unfair, is without merit. Congress has delegated to the Immigration Bureau such powers as are necessary for the enforcement of the immigration laws, and the Supreme Court of the United States has most emphatically decided that such powers are constitutional and proper. Without any further comment, the government cites the following Supreme Court decisions:

Ekiu v. United States, 142 U. S. 651;
Japanese Immigrant case, 189 U. S. 86;
Low Wah Suey v. Backus, 225 U. S. 460;
Zakonaite v. Wolf, 226 U. S. 272;
Bugajewitz v. Adams, 228 U. S. 584;
Frick v. Lewis, 232 U. S. 291.

The other point under this subdivision urged by counsel for appellant, is that in the proceedings in this case Immigrant Inspector in Charge, F. H. Ainsworth, conducted the raid, made the arrest and compiled the immigration record sent on to the Secretary of Labor. It is claimed that since he gathered the evidence before the arrest, he was prejudiced against the alien in his official zeal to have the woman deported. However, the facts are that the Chief of Police of San Francisco conducted

the raid without the assistance of the Immigration Bureau, and it was only after the aliens were taken into custody that the Immigration Inspector Ainsworth was notified to take charge of them.

The argument that the alien was prevented from having a fair trial because this immigration inspector conducted the hearings and then sat in judgment and made recommendations in the case to the Secretary of Labor, is indeed shallow. A more complete and convincing answer to counsel's allegations could not be desired than the opinion in Ex parte Kwan So, 211 Fed. 772, and the government respectfully requests that that decision be read in conjunction with the case of Choy Gum.

The courts, by a long process of development and in a great many decisions, have firmly established the principle that an order of deportation in an immigration case will not be reviewed upon a petition for a writ of habeas corpus where the alien has had a fair hearing and where there is at least some evidence in the record to support the finding of the Secretary of Labor.

In this case, the government contends that the alien, Choy Gum, has had every opportunity to fairly present her defense against deportation, and further, that there is not only some evidence, but that there is ample and conclusive evidence that this alien woman was engaged in prostitution in the United States.

It is therefore earnestly requested that the opinion of the lower court be sustained.

Dated, San Francisco,
January 18, 1915.

Respectfully submitted,

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